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No. 03-339

Supreme Court, U.S.
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In The
Supreme Court of the United States

JOSE FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* LAWYERS COMMITTEE FOR HUMAN RIGHTS AND THE RUTHERFORD INSTITUTE IN SUPPORT OF RESPONDENTS

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28 pp

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST OF *AMICI CURIAE*	1
ARGUMENT	2
I. THE COURTS OF APPEALS ARE NOT DIVIDED ON THE PROPER REACH OF THE ATA AND HAVE DEVELOPED A CONSISTENT AND MANAGEABLE JURISPRUDENCE	3
A. The Courts Of Appeals Have Consistently Held That ATA Jurisdiction Is Limited To Well-Established, Universally Recognized Norms Of International Law	4
B. Federal Courts Applying This Standard Have Distinguished Between Claims That Are Properly Brought Under The ATA And Those That Are Not	6
C. Claims Under The ATA Do Not Involve The Extraterritorial Application Of United States Law	10
D. Claims Under The ATA Do Not Improperly Interfere With The Political Branches' Ability To Conduct Foreign Affairs	12
II. THE COURTS OF APPEALS HAVE UNANIMOUSLY AND CORRECTLY REJECTED PETITIONER'S ARGUMENT THAT A SEPARATE CAUSE OF ACTION SHOULD BE REQUIRED	14

TABLE OF CONTENTS – Continued

Page

A. Petitioner's Cause Of Action Argument Rests On An Anachronism And Would Make The ATA Meaningless 14

B. Congress Rejected The Requirement Of A Separate Cause Of Action When It Enacted The Torture Victim Protection Act Of 1991 17

C. Repealing The ATA Would Leave Important Questions Of International Law To The Courts Of The Several States 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996) 2, 5, 7, 14

Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003) 14

Alvarez-Machain v. United States, 331 F.3d 604 (9th Cir. 2003) 3, 5, 6, 9

American Ins. Ass'n v. Garamendi, 123 S. Ct. 2374 (2003) 19

Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668 (S.D.N.Y. 1991) 8

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 19

Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999) 5, 8

Estate of Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345 (S.D. Fla. 2001) 7

Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico S.A., 528 F. Supp. 1337 (S.D.N.Y. 1982) 8

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) 15

Chrysler Corp. v. Brown, 441 U.S. 281 (1979) 15

Cohen v. Hartman, 634 F.2d 318 (5th Cir. 1981) 8

Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) 19

Davis v. Passman, 442 U.S. 228 (1979) 16

De Wit v. KLM Royal Dutch Airlines, 570 F. Supp. 613 (S.D.N.Y. 1983) 8

TABLE OF AUTHORITIES – Continued

Page

Doe I v. Unocal Corp., No. BC 237980 (Cal. Super. Ct., County of L.A., filed Oct. 4, 2000), No. BC 237679 (Cal. Super. Ct., County of L.A., filed Sept. 29, 2000) 18

Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997) 7

EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) 10

Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) ..... *passim*

Flores v. Southern Peru Copper Corp., 343 F.3d 140 (2d Cir. 2003) 3, 4, 6, 8, 10

Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987) 7

Guinto v. Marcos, 654 F. Supp. 276 (S.D. Cal. 1986) 8

Hamid v. Price Waterhouse, 51 F.3d 1411 (9th Cir. 1995) 8

Hilao v. Estate of Marcos, 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995) 2, 4, 5, 7, 14

Jones v. Petty Ray Geophysical Geosource, Inc., 722 F. Supp. 343 (S.D. Tex. 1989) 8

Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996) ..... *passim*

Martinez v. City of Los Angeles, 141 F.3d 1373 (9th Cir. 1998) 5

McKenna v. Fisk, 42 U.S. (1 How.) 241 (1843) 11

Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) 7

Mostyn v. Fabrigas, 98 Eng. Rep. 1021 (K.B. 1774) 11

TABLE OF AUTHORITIES – Continued

Page

Mushikiwabo v. Barayagwiza, No. 94 CIV. 3267 (JSM), 1996 WL 164496 (S.D.N.Y. Apr. 9, 1996) 7

Papa v. United States, 281 F.3d 1004 (9th Cir. 2002) 5

Paul v. Avril, 901 F. Supp. 330 (S.D. Fla. 1994) 7

Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003) 7

Respublica v. De Longchamps, 1 U.S. 111 (Pa. 1784) 16

Estate of Rodriquez v. Drummond Co., 256 F. Supp. 2d 1250 (N.D. Ala. 2003) 7, 8

Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) 8

Smith v. United States, 18 U.S. (5 Wheat.) 153 (1820) 9

Tachiona v. Mugabe, 234 F. Supp. 2d 401 (S.D.N.Y. 2002) 7

Tamari v. Bache & Co. S.A.L., 730 F.2d 1103 (7th Cir. 1984) 8

Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) 2, 14, 16

The Paquete Habana, 175 U.S. 677 (1900) 10

Trajano v. Marcos, 978 F.2d 493 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993) 2, 7

United States v. La Jeune Eugenie, 26 F. Cas. 832 (C.C.D. Mass. 1822), *overruled on other grounds*, 23 U.S. (10 Wheat.) 66 (1825) 16

Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) 16

Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001) 2

TABLE OF AUTHORITIES – Continued

Page

Wiwa v. Royal Dutch Petroleum Co., No. 96 CIV. 8386 (KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002) 7

Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) 7

Zapata v. Quinn, 707 F.2d 691 (2d Cir. 1983) 4

LEGISLATIVE MATERIALS

18 U.S.C. § 2333 13

28 U.S.C. § 1350 ..... *passim*

28 U.S.C. § 1605(a)(7) 13

1848 N.Y. Laws, ch. 379, § 120(2) 16

Pub. L. No. 102-256, 106 Stat. 73 (1992) (*codified at* 28 U.S.C. § 1350 note) 12

H.R. REP. NO. 102-367 (I), *reprinted in* 1992 U.S.C.C.A.N. 84 (Nov. 25, 1991) 13, 17

S. REP. NO. 102-249, 1991 WL 258662 (Leg. Hist.) (Nov. 26, 1991) 13, 17

MISCELLANEOUS

Anne-Marie Burley [Slaughter], *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989) 15

4 William Blackstone, Commentaries on the Laws of England (1769) 15, 16

Brief Amicus Curiae United States, *Doe I v. Unocal Corp.* (Nos. 00-56603, 00-56628) (9th Cir. filed May 8, 2003) 15

TABLE OF AUTHORITIES – Continued

Page

Brief of United States, *Tel-Oren v. Libyan Arab Republic*, *reprinted in* 24 I.L.M. 427 (1985) 14

William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986) 15

THE FEDERALIST NO. 3 (John Jay) (Clinton Rossiter ed., 1961) 18

Memorandum of United States, *Filartiga v. Pena-Irala*, *reprinted in* 19 I.L.M. 585 (1980) 12

Opinion concerning actions that might be taken against Americans who had aided the French in attacking the British colony of Sierra Leone, 1 Op. Att'y Gen. 57 (1795) 11

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Resolution of Nov. 23, 1781, 21 Journals of the Continental Congress 1774-1789 15

Restatement (Third) of the Foreign Relations Law of the United States, pt. 1, ch. 1, Introductory Note (1987) 2

Restatement (Third) of the Foreign Relations Law of the United States, pt. 1, ch. 1, § 102 (1987) 5

John M. Walker, Jr., *Domestic Adjudication of International Human Rights Violations Under the Alien Tort Statute*, 41 ST. LOUIS U. L.J. 539 (1997) 13

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici are organizations that join to support the traditional understanding of the Alien Tort Claims Act.

Since 1978, the Lawyers Committee for Human Rights ("LCHR") has worked in the United States and abroad to create a secure and humane world by advancing justice, human dignity and respect for the rule of law. It supports human rights activists who fight for basic freedoms and peaceful change at the local level; promotes fair economic practices by creating safeguards for workers' rights; protects refugees in flight from persecution and repression; works to ensure that domestic legal systems incorporate international human rights protections; and helps build a strong international system of justice and accountability for the worst human rights crimes. LCHR believes this case presents compelling issues of justice for victims of human rights.

The Rutherford Institute ("Institute") is a non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have appeared as counsel or submitted *amicus curiae* briefs before the United States Supreme Court and federal appeals courts in many significant civil liberties and human rights cases. Institute attorneys currently handle several hundred civil rights cases nationally at all levels of federal and state

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[1] Pursuant to Rule 37.2(a), all parties have consented by letter to the filing of this amici brief. Copies of the consent letters accompany the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amici Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

courts. The present case raises important human rights concerns, and so is of significance to the Institute.

ARGUMENT

The decision below is fully consistent with the decisions of other Courts of Appeals. There is no conflict among the Circuits on any of the questions presented in the petition and no other compelling reason for review. This Court has repeatedly denied petitions for writs of certiorari in Alien Tort Act (ATA) cases, *see, e.g.*, *Wiwa* v. *Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); *Abebe-Jira* v. *Negewo*, 72 F.3d 844 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996); *Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *Hilao* v. *Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *Trajano* v. *Marcos*, 978 F.2d 493 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993); *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985), and should deny the instant petition as well.

Enacted in 1789 as part of the First Judiciary Act, the ATA provides: "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.[2] The federal courts have interpreted the ATA in a consistent and restrained

[2] The term "law of nations" was used until the early 20th century to refer to customary rules and obligations that regulated interactions between states and certain aspects of state interactions with individuals. It has now been supplanted by the term "customary international law." *See* Restatement (Third) of the Foreign Relations Law of the United States pt. I, ch. 1, Introductory Note (1987) [hereinafter Restatement (Third)].

manner, which Congress endorsed when it passed the Torture Victim Protection Act of 1991 (TVPA). Petitioner invites this Court effectively to repeal the ATA by engrafting onto it a cause-of-action requirement that was unknown at the time the ATA was passed. Such a repeal of the ATA would be contrary to the intent of the Congress that passed the ATA and of the Congress that passed the TVPA and would leave important questions of international law to the courts of the fifty states. Petitioner's "cause-of-action" argument has properly been rejected by every Court of Appeals to have considered it.

I. THE COURTS OF APPEALS ARE NOT DIVIDED ON THE PROPER REACH OF THE ATA AND HAVE DEVELOPED A CONSISTENT AND MANAGEABLE JURISPRUDENCE.

The Courts of Appeals have consistently limited jurisdiction under the ATA to torts that violate "well-established, universally recognized norms of international law." *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980). As *Filartiga* itself pointed out, this standard is a "stringent one," *id.* at 881, and claims that have failed to meet it have been readily dismissed. *See, e.g.*, *Alvarez-Machain* v. *United States*, 331 F.3d 604, 617-20 (9th Cir. 2003) (en banc) (holding that claim for transborder abduction does not meet ATA standard for jurisdiction); *Flores* v. *Southern Peru Copper Corp.*, 343 F.3d 140, 172 (2d Cir. 2003) (holding that claims based on environmental pollution do not meet ATA standard for jurisdiction). By limiting jurisdiction to "universally recognized" norms, the federal courts have avoided imposing United States standards of conduct extraterritorially and have avoided unnecessary friction with foreign governments. Congress endorsed *Filartiga*'s approach when it passed the Torture Victim Protection Act of 1991 and has continued to expand the availability of federal courts to hear claims based on violations of international law.

A. The Courts Of Appeals Have Consistently Held That ATA Jurisdiction Is Limited To Well-Established, Universally Recognized Norms Of International Law.

In *Filartiga*, the Second Circuit held that the ATA conferred jurisdiction over torts such as official torture that violate "well-established, universally recognized norms of international law," 630 F.2d at 888, a standard to which the Second Circuit has adhered ever since. *See, e.g.*, *Flores*, 343 F.3d at 154 (citing *Filartiga* for the proposition that "customary international law [includes only] well-established, universally recognized norms of international law"); *Kadic*, 70 F.3d at 239 (stating that if "the defendant's alleged conduct violates 'well-established, universally recognized norms of international law,' then federal jurisdiction exists under the Alien Tort Act"); *Zapata* v. *Quinn*, 707 F.2d 691, 692 (2d Cir. 1983) (per curiam) (citing *Filartiga* for the proposition that the ATA applies only to "violations of universally recognized principles of international law"). This standard ensures that federal courts will apply only those international norms that are clearly accepted as binding by the community of nations. *See Filartiga*, 630 F.2d at 881 ("The requirement that a rule command the 'general assent of civilized nations' to become binding upon them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law."). As the Second Circuit subsequently noted in *Kadic*, "*Filartiga* established that universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion." 70 F.3d at 249.

Other Circuits have consistently followed the approach set forth in *Filartiga*. In *Hilao*, the Ninth Circuit

relied expressly upon *Filartiga* in holding that "[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory." 25 F.3d at 1475; *see also Alvarez-Machain*, 331 F.3d at 612 ("In [*Hilao*] we were careful to limit actionable violations to those international norms that are 'specific, universal, and obligatory.'"); *Papa* v. *United States*, 281 F.3d 1004, 1013 (9th Cir. 2002) (noting that "plaintiffs must allege a violation of 'specific, universal, and obligatory' international norms as part of an ATA claim"); *Martinez* v. *City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998) ("The applicable norm of international law must be 'specific, universal, and obligatory.'").

The Eleventh and Fifth Circuits have also echoed the *Filartiga* approach. In *Abebe-Jira*, 72 F.3d 844, the Eleventh Circuit held that torture was actionable under the ATA, citing case law from both the Second and Ninth Circuits. In *Beanal* v. *Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999), the Fifth Circuit held that claims based on environmental damage were not actionable under the ATA because they did not meet the standard articulated by the Second Circuit. In neither case did the Court of Appeals express any concern about a conflict among the Circuits.

Petitioner does not and could not assert that there is any substantive difference between the "well-established, universally recognized" formulation used by the Second Circuit and the "specific, universal, and obligatory" formulation used by the Ninth. Rather, Petitioner asserts that in *Kadic* the Second Circuit limited ATA jurisdiction to violations of *jus cogens* norms. Pet. at 22-25.[3] While the

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[3] *Jus cogens* norms are a subset of international law norms from which no derogation is permitted. It is worth noting that the notion of *jus cogens* is of relatively modern origin and was unknown at the time the ATA was enacted. *See* Restatement (Third), *supra*, § 102, Reporters' Note 6.

claims in *Kadic* did involve *jus cogens* violations, the Court of Appeals in that case never suggested that jurisdiction under the ATA was limited to such claims. As Petitioner concedes, *Kadic* never even used the term "*jus cogens*." Pet. at 23, n.6. Neither does the Second Circuit's most recent decision under the ATA. *See Flores*, 343 F.3d at 140. And none of the cases decided since *Kadic* acknowledge the existence of a conflict among the Circuits on this point. The most charitable characterization of Petitioner's argument is that it mistakes a sufficient condition for a necessary one. But as the Court of Appeals observed in rejecting Petitioner's *jus cogens* argument below, "the fact that a violation of this subcategory of international norms is *sufficient* to warrant an actionable claim under the ATA does not render it *necessary*." *Alvarez-Machain*, 331 F.3d at 613.

In short, there is simply no dispute among the lower courts that the ATA confers jurisdiction over torts that violate well-established, universally recognized norms of international law. This Court should disregard Petitioner's attempt to create such a dispute by misreading the decisions of the Second Circuit.

B. Federal Courts Applying This Standard Have Distinguished Between Claims That Are Properly Brought Under The ATA And Those That Are Not.

Since *Filartiga*, the federal courts have engaged in a careful and measured analysis of the individual claims raised in ATA cases, hearing those claims that have been based on violations of well-established, universally recognized norms of international law and dismissing those claims that have not.

For example, the federal courts have recognized that the prohibition against genocide constitutes a well-established, universally recognized norm of international law. In *Kadic*, the Second Circuit found that allegations of

rape, forced impregnation, torture, and murder with the intent to destroy religious and ethnic groups in the territory of the former Yugoslavia clearly stated a violation of the international norm against genocide. 70 F.3d at 242. In *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003), an association of religious and community groups alleged that defendants collaborated with the Sudanese government in a campaign of religious and ethnic cleansing against the non-Muslim population in southern Sudan. Not surprisingly, the district court found that such genocidal acts were clearly prohibited under international law and were subject to the ATA. *See also Mehinovic* v. *Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (claims based on genocide in Bosnia-Herzegovina); *Mushikiwabo* v. *Barayagwiza*, No. 94 CIV. 3267 (JSM), 1996 WL 164496 (S.D.N.Y. Apr. 9, 1996) (claims based on genocide in Rwanda). Federal courts have also recognized the viability of ATA suits for such well-established claims as torture[4] and summary execution.[5]

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[4] *Abebe-Jira* v. *Negewo*, 72 F.3d 844 (11th Cir. 1996); *Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Hilao* v. *Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994); *Trajano* v. *Marcos*, 978 F.2d 493 (9th Cir. 1992); *Presbyterian Church of the Sudan* v. *Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003); *Wiwa* v. *Royal Dutch Petroleum Co.*, No. 96 CIV. 8386 (KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002); *Tachiona* v. *Mugabe*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002); *Mehinovic* v. *Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002); *Doe* v. *Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997); *Xuncax* v. *Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Paul* v. *Avril*, 901 F. Supp. 330 (S.D. Fla. 1994); *Forti* v. *Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987).

[5] *Estate of Rodriquez* v. *Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003); *Tachiona* v. *Mugabe*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002); *Estate of Cabello* v. *Fernandez-Larios*, 157 F. Supp. 2d 1345 (S.D. Fla. 2001); *Wiwa* v. *Royal Dutch Petroleum Co.*, No. 96 CIV. 8386 (KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002); *Xuncax* v. *Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Forti* v. *Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987).

At the same time, federal courts have firmly rejected claims that are not based on well-established, universally recognized norms of international law.[6] For example, federal courts have repeatedly dismissed ATA cases based on environmental harms. Most recently, in *Flores*, 343 F.3d at 140, the Second Circuit concluded after careful analysis that the alleged rights to life and health were insufficiently definite to constitute rules of customary international law and that customary international law did not prohibit intranational pollution. *See also Beanal*, 197 F.3d 161; *Sarei* v. *Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1160-61 (C.D. Cal. 2002); *Amlon Metals, Inc.* v. *FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991). Courts have also dismissed a panoply of other ATA actions that failed to raise recognized claims under international law such as fraud,[7] negligence,[8] censorship,[9] commercial torts,[10] and conversion.[11]

[6] The federal courts have also dismissed claims involving well-established, universally recognized norms of international law when the pleadings fail to support the essential elements of the claim. *See, e.g.*, *Beanal* v. *Freeport-McMoran, Inc.*, 197 F.3d 161, 168 (5th Cir. 1999) (genocide claim unavailable when pleadings "are devoid of discernable means to define or identify conduct that constitutes a violation of international law"); *Estate of Rodriquez* v. *Drummond Co.*, 256 F. Supp. 2d 1250, 1261 (N.D. Ala. 2003) (genocide claim unavailable where plaintiffs failed to allege that persecution was due to national, ethnic, racial, or religious reasons).

[7] *See Hamid* v. *Price Waterhouse*, 51 F.3d 1411, 1418 (9th Cir. 1995); *Tamari* v. *Bache & Co. S.A.L.*, 730 F.2d 1103, 1104 (7th Cir. 1984).

[8] *See Jones* v. *Petty Ray Geophysical Geosource, Inc.*, 722 F. Supp. 343, 348 (S.D. Tex. 1989).

[9] *See Guinto* v. *Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986).

[10] *See De Wit* v. *KLM Royal Dutch Airlines*, 570 F. Supp. 613, 618 (S.D.N.Y. 1983); *Canadian Overseas Ores, Ltd.* v. *Compania de Acero del Pacifico S.A.*, 528 F. Supp. 1337, 1347 (S.D.N.Y. 1982).

[11] *See Cohen* v. *Hartman*, 634 F.2d 318, 320 (5th Cir. 1981).

Indeed, even the decision below illustrates the ability of federal courts to apply the ATA's jurisdictional standard and determine which claims may be brought and which may not. For while the Ninth Circuit concluded that "there exists a clear and universally recognized norm prohibiting arbitrary arrest and detention," *Alvarez-Machain*, 331 F.3d at 620, the court also *rejected* Respondent's claim based on transborder kidnapping, concluding that because the "right to be free from transborder abductions has not reached a status of international accord sufficient to render it 'obligatory' or 'universal,' it cannot qualify as an actionable norm under the ATCA." *Id.*[12]

Petitioner also mistakenly suggests that courts applying the ATA have improperly relied upon non-self-executing treaties and the writings of law professors. Pet. at 19-20. In fact, the federal courts have consistently followed this Court's "directive that the law of nations 'may be ascertained by consulting the work of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'" *Alvarez-Machain*, 331 F.3d at 617 (quoting *Smith* v. *United States*, 18 U.S. (5 Wheat.) 153, 160-61 (1820)). Courts have not allowed ATA plaintiffs to bring suits under non-self-executing treaties. Rather, they have looked to *widely accepted* treaties as *evidence* of customary international law. *See, e.g.*, *Kadic*, 70 F.3d at 238 n.1; *Filartiga*, 630 F.2d at 880 n.7, 882-84. As the Second Circuit recently explained:

> All treaties that have been ratified by at least two States provide *some* evidence of the custom and practice of nations. However, a treaty will

[12] *Amici* take no position on whether Respondent's claims satisfy the jurisdictional standard of the ATA, but simply note that Petitioner has alleged no conflict among the Circuits on this question and that it is not independently worthy of this Court's attention.

> only constitute *sufficient proof* of a norm of customary international law if an overwhelming majority of States have ratified the treaty, *and* those States uniformly and consistently act in accordance with its principles.

Flores, 343 F.3d at 162-163. With respect to the writings of law professors, courts applying the ATA have from the very beginning followed this Court's instructions and consulted them "'not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.'" *Filartiga*, 630 F.2d at 881 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)); *see also Flores*, 343 F.3d at 171.

The experience of more than twenty years shows that the federal courts have had little difficulty determining the contours of customary international law or distinguishing claims that are based on well-established, universally recognized norms from those that are not.

C. Claims Under The ATA Do Not Involve The Extraterritorial Application Of United States Law.

In his Petition for Certiorari, Petitioner makes the novel argument that the presumption against extraterritoriality applies to the ATA. No lower court has ever addressed this argument and this Court should decline Petitioner's invitation to be the first to do so.

The presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). Courts hearing claims under the ATA, however, are not applying "our laws" extraterritorially. Rather, they are applying "well-established, universally recognized norms of international law," *Filartiga*, 630 F.2d at 888, that apply throughout the world.

Petitioner's suggestion that the presumption against extraterritoriality applies not just to limit the application of United States domestic law abroad but whenever a case arises abroad would be contrary to the understanding of the First Congress. Since *Mostyn* v. *Fabrigas*, 98 Eng. Rep. 1021 (K.B. 1774), it has been established that actions for tort (other than trespass upon real property) are transitory and may be brought wherever the tortfeasor is found. *See generally McKenna* v. *Fisk*, 42 U.S. (1 How.) 241, 247-49 (1843) (discussing the doctrine of transitory torts).[13] The contemporaneous understanding of how the presumption against extraterritoriality applied to domestic legislation on the one hand and to the ATA on the other is demonstrated in a 1795 Attorney General's *Opinion concerning actions that might be taken against Americans who had aided the French in attacking the British colony of Sierra Leone*. 1 Op. Att'y Gen. 57 (1795). Attorney General Bradford first opined that United States criminal legislation did not apply to actions in a foreign country. *Id.* at 58. He then continued:

> But there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States. . . .

Id. at 59. In short, the presumption against extraterritoriality has no bearing on suits under the ATA.

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[13] Under well-established conflict-of-laws rules, United States courts routinely decide cases that arise abroad under foreign law. Petitioner's suggestion that the presumption against extraterritoriality applies whenever the dispute arises abroad would throw the field of conflicts into turmoil.

D. Claims Under The ATA Do Not Improperly Interfere With The Political Branches' Ability To Conduct Foreign Affairs.

Petitioner further suggests that suits under the ATA interfere with the ability of the political branches to conduct foreign affairs. Pet. at 15-21. The judgment of the State Department and the Department of Justice when the *Filartiga* case was before the Second Circuit was quite different. In a memorandum submitted to the Second Circuit, the United States wrote:

> [B]efore entertaining a suit alleging a violation of human rights, a court must first conclude that there is a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection. . . . When these conditions have been satisfied, there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights.

Memorandum for the United States Submitted to the Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*, *reprinted in* 19 I.L.M. 585, 604 (1980). If the experience since *Filartiga* had demonstrated that this view was mistaken, Congress could have limited ATA suits to address foreign policy concerns.

Instead, Congress has endorsed the *Filartiga* line of cases and has chosen to expand the availability of federal courts as forums for violations of international law. In 1991, Congress enacted the TVPA, which codifies the right of aliens to sue for official torture and extrajudicial killing. Pub. L. No. 102-256, 106 Stat. 73 (1992), (codified at 28 U.S.C. § 1350 note). Both the House and Senate Reports endorsed *Filartiga*, noting that the decision had "met with

general approval." H.R. Rep. No. 102-367 (I), at 86, reprinted in 1992 U.S.C.C.A.N. 84 (Nov. 25, 1991) [hereinafter House Report]; S. Rep. No. 102-249, 1991 WL 258662 (Leg. Hist.) at 4 (Nov. 26, 1991) [hereinafter Senate Report]. Furthermore, in enacting the TVPA, Congress chose to expand the use of federal courts to enforce international law by extending the right to sue for torture and extrajudicial killing to citizens. Shortly after enacting the TVPA, Congress moved again in the Antiterrorism Act of 1991 to grant United States nationals injured by international terrorism the right to sue for treble damages. 18 U.S.C. § 2333. And in 1996, Congress authorized the federal courts to hear still more international suits in the Antiterrorism and Effective Death Penalty Act, which amended the Foreign Sovereign Immunities Act to permit suits for torture and extrajudicial killing against state sponsors of terrorism. 28 U.S.C. § 1605(a)(7).

As Chief Judge Walker has observed,

> [The ATA] is simply an act of Congress. If it raises valid policy concerns and if adjudication under it leads to real-world problems for the executive or the legislature, it may be amended, or even repealed. The fact that Congress has not done so, and, indeed, appears to have endorsed the *Filartiga* approach in the legislative history of the Torture Victim Protection Act, indicates that the substantial concerns that have been voiced are, at least at this point, largely theoretical.

John M. Walker, Jr., *Domestic Adjudication of International Human Rights Violations Under the Alien Tort Statute*, 41 St. Louis U. L.J. 539, 560 (1997).

II. THE COURTS OF APPEALS HAVE UNANIMOUSLY AND CORRECTLY REJECTED PETITIONER'S ARGUMENT THAT A SEPARATE CAUSE OF ACTION SHOULD BE REQUIRED.

Petitioner concedes that there is no conflict among the Circuits over whether a separate cause of action is required to bring suit under the ATA. Pet. at 8. Indeed, the Second, Ninth, and Eleventh Circuits have unanimously agreed that no separate cause of action is required. *Abebe-Jira*, 72 F.3d at 847; *Kadic*, 70 F.3d at 241; *Hilao*, 25 F.3d at 1475. The only contrary opinion is found in the concurring opinions of Judge Bork in *Tel-Oren*, 726 F.2d at 801 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985), and Judge Randolph in *Al Odah* v. *United States*, 321 F.3d 1134, 1148 (D.C. Cir. 2003) (Randolph, J., concurring), who agreed with Judge Bork. As the United States has previously told this Court, however, the opinions in *Tel-Oren* have "little, if any, precedential value." United States Brief Submitted to Supreme Court in Response to Court's Invitation in Reviewing Petition for a Writ of Certiorari, *reprinted in* 24 I.L.M. 427, 432 (1985).

Petitioner's cause-of-action argument would effectively repeal the ATA by engrafting onto it a requirement that was unknown at the time the ATA was passed. Repealing the ATA in this way would be contrary to the intent of the Congress that passed the ATA in 1789 and of the Congress that passed the TVPA in 1991 and would leave important questions of international law to the potentially conflicting decisions of state courts.

A. Petitioner's Cause Of Action Argument Rests On An Anachronism and Would Make the ATA Meaningless.

This Court should not assume that the First Congress intended to enact a statute that was meaningless. But if Petitioner is correct that a separate cause of action was

required for suits under the ATA, that statute would have been a nullity the moment it was passed. In 1789, the violations of international law that the First Congress probably had in mind were those Blackstone had identified as "[t]he principal offences against the law of nations . . . ; 1. Violation of safe-conducts; 2. Infringement of the rights of embassadors [sic]; and 3. Piracy." 4 William Blackstone, Commentaries *68.[14] A highly publicized assault on the French ambassador in 1784 is thought to have been the specific impetus for including this provision in the First Judiciary Act. *See* Anne-Marie Burley [Slaughter], *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461, 469-70 (1989); William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 491-94 (1986); Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. Int'l L. & Pol. 1, 24-27 (1985). Yet no statute created a separate cause of action for these violations of the law of nations or any others,[15] and even Judge Bork was forced to acknowledge that a separate cause of action should not be required

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[14] In 1781, the Continental Congress had specifically listed the first two offenses in a resolution recommending that the States enact laws to punish infractions of the law of nations and to authorize suits for damages by the injured party. Resolution of Nov. 23, 1781, 21 Journals of the Continental Congress 1774-1789, at 1136-37.

[15] In a brief that Petitioner has appended to his Petition, the Department of Justice suggests that a 1790 statute criminalizing piracy, violations of the rights of ambassadors, and violations of safe-conducts provided the necessary cause of action for these offenses. Brief Amicus Curiae United States at 10-12, *Doe I* v. *Unocal Corp.* (9th Cir. filed May 8, 2003) (Nos. 00-56603, 00-56628) (en banc). Under this Court's jurisprudence, however, criminal statutes are not sufficient to grant civil causes of action. *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994); *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 284 (1979).

for piracy, assaults on ambassadors, and violations of safe-conducts if the ATA were to have any meaning. *Tel-Oren*, 726 F.2d at 813-14 & n.22.[16]

The First Congress passed no statutes granting a separate cause of action to bring suit under the ATA because that requirement was unknown at the time. The phrase "cause of action" became a legal term of art only in 1848, when the New York Code of Civil Procedure abolished the distinction between law and equity "and simply required a plaintiff to include in his complaint '[a] statement of the facts constituting the cause of action.'" *Davis* v. *Passman*, 442 U.S. 228, 237 (1979) (quoting 1848 N.Y. Laws, ch. 379, § 120(2)). In 1789, the law of nations was considered to be part of the common law,[17] and the First Congress expected "torts in violation of the law of nations" to be actionable at common law just as other torts were.

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[16] To limit the ATA to those violations that were recognized in 1789 would be contrary to the expectations of the First Congress, which understood that the law of nations evolves. *See, e.g.*, *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) (Wilson, J., concurring) ("When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."); *United States* v. *La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551) (Story, J.), *overruled on other grounds*, 23 U.S. (10 Wheat.) 66 (1825) ("It does not follow . . . that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations."). It would also be contrary to the text of the ATA, which does not enumerate specific torts but rather provides jurisdiction over "*any* civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (emphasis added).

[17] *See, e.g.*, 4 Blackstone, *supra*, at *67 ("the law of nations . . . is . . . adopted in it's [sic] full extent by the common law, and is held to be a part of the law of the land"); *Respublica* v. *De Longchamps*, 1 U.S. 111, 116 (Pa. 1784) ("the law of Nations . . . , in its full extent, is part of the law of this State").

In short, Petitioner's argument rests on an anachronism. It would also defeat the intent of the First Congress, which expected torts in violation of the law of nations to be actionable at common law without any further congressional action.

B. Congress Rejected The Requirement Of A Separate Cause Of Action When It Enacted The Torture Victim Protection Act Of 1991.

Congress also rejected the requirement of a separate cause of action when it enacted the TVPA. After stating that the *Filartiga* case had "met with general approval," the House and Senate Reports noted that Judge Bork had "questioned whether section 1350 can be used by victims of torture committed in foreign nations absent an explicit grant of a cause of action." House Report, *supra*, at 86; *see also* Senate Report, *supra*, at 4-5. In passing the TVPA, Congress sided with *Filartiga* and against Judge Bork, reiterating the right of aliens to sue for torture and extrajudicial killing and "enhanc[ing] the remedy *already available* under section 1350 . . . [by] extend[ing] a civil remedy also to U.S. citizens who may have been tortured abroad." House Report, *supra*, at 86 (emphasis added); Senate Report, *supra*, at 5 (emphasis added). Lest its intent be misconstrued, both the House and Senate Reports further emphasized that "claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350" and that the ATA "should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law." House Report, *supra*, at 86; *see also* Senate Report, *supra*, at 5. Engrafting a separate cause-of-action requirement onto the ATA would thus frustrate not just the intent of the First Congress but the intent of the 102d as well.

C. Repealing The ATA Would Leave Important Questions Of International Law To The Courts Of The Several States.

If suits for torts in violation of the law of nations cannot be brought in federal court, they will be brought in state court. After the district court in *Doe I* v. *Unocal Corp.* dismissed plaintiffs' ATA claims based on human rights abuses in Burma, plaintiffs refiled their claims in Los Angeles superior court, where proceedings are ongoing. *See Doe I* v. *Unocal Corp.*, No. BC 237980 (Cal. Super. Ct., County of L.A., filed Oct. 4, 2000), No. BC 237679 (Cal. Super. Ct., County of L.A., filed Sept. 29, 2000).[18]

The Framers of the Constitution were concerned that questions of international law not be left to the courts of the several states. As John Jay wrote in The Federalist:

> Under the national government, treaties and articles of treaties, as well as the law of nations, will always be expounded in one sense, and executed in the same manner – whereas adjudications on the same points and question, in thirteen States . . . will not always accord or be consistent. . . . The wisdom of the convention in committing such questions to the jurisdiction and judgment of courts appointed by, and responsible only to one national Government cannot be too much commended.

The Federalist No. 3, at 43 (John Jay) (Clinton Rossiter ed., 1961).

This Court has recognized that the ATA is one of a number of congressional enactments "reflecting a concern for uniformity in this country's dealings with foreign

[18] In the ATA suit, plaintiffs' appeal of the district court's dismissal is currently pending before an en banc panel of the Ninth Circuit. *See Doe I* v. *Unocal Corp.*, Nos. 00-56603, 00-56628 (9th Cir. en banc) (argued June 17, 2003).

nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427 n.25 (1964). If suits for violations of the law of nations were left to the state courts, the only way to maintain such uniformity would be through review by this Court.

In recent years, this Court has invalidated state initiatives in the human rights area that undermined the ability of the United States to speak with "one voice" in foreign affairs. In *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363 (2000), this Court held that a Massachusetts law designed to promote human rights in Burma was preempted where Congress had enacted its own set of sanctions. Just last Term in *American Ins. Ass'n* v. *Garamendi*, 123 S. Ct. 2374 (2003), this Court held that a California statute requiring disclosure of information about Holocaust-era insurance policies impermissibly interfered with federal authority over foreign affairs even in the absence of congressional action. It would be ironic if this Court were to accept Petitioner's invitation in this case to strip the federal courts of authority to hear suits for torts in violation of the law of nations – authority expressly granted by Congress in 1789 and reaffirmed in 1991 – and leave such suits for resolution by the courts of the fifty states.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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